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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
The Petition of the State of Minnesota, Acting	)	
by and through the Minnesota Department of	)	
Transportation and the Minnesota Department	)	CC Docket No. 98-1
of Administration, for a Declaratory Ruling	)	
Regarding the Effect of Sections 253(a), (b)	)	
and (c) of the Telecommunications Act of	)	
1996 on an Agreement to Install Fiber	)	
Optic Wholesale Transport Capacity in	)	
State Freeway Rights-of-Way	)	

COMMENTS OF MFS NETWORK TECHNOLOGIES, INC. ON THE PETITION FOR DECLARATORY RULING REGARDING THE EFFECT OF SECTIONS 253(a), (b) AND (c) OF THE TELECOMMUNICATIONS ACT OF 1996 ON AN AGREEMENT TO INSTALL FIBER OPTIC WHOLESALE TRANSPORT CAPACITY IN STATE FREEWAY RIGHTS-OF-WAY

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Dated: March 9, 1998

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SUMMARY

MFS Network Technologies, Inc. ("MFS") opposes the Petition for a Declaratory Ruling ("Petition") of the Minnesota Department of Transportation and Department of Administration (collectively "Minnesota"). Minnesota has filed the Petition to determine whether the Commission will preempt under Section 253 of the Communications Act of 1934, as amended, ("Act") the agreement that Minnesota has entered with ICS/UCN LLC and Stone & Webster Engineering Corporation (collectively "the Developer") on December 23, 1997.

Through the Agreement, Minnesota grants the Developer exclusive access to public rights-of-way on interstate freeways in exchange for valuable telecommunications services and facilities. The Agreement grants the Developer the exclusive right, for at least ten years, to place telecommunications facilities and equipment longitudinally along freeway rights-of-way. The Developer plans to build over 1,000 sheath miles of a fiber optic network over freeways in Minnesota. In return, the state will receive approximately 20% of the resulting lit fiber capacity and ten fiber strands on every dark fiber ring in the Developer's network.

MFS opposes the Agreement and urges the Commission to preempt it under Section 253 because Minnesota has created a barrier to entry that both prohibits and has the effect of prohibiting carriers from offering intrastate and interstate telecommunications services in the state. MFS explains that Minnesota cannot find an exception to preemption under Section 253(b) or (c). MFS argues Section 253(b) does not save the Agreement because:

(1) permitting one party exclusive access to freeway rights-of-way longitudinally to the exclusion of all others, is not the least restrictive means of protecting public safety, but rather is the most restrictive means;

(2) the Agreement falls short of meeting the legal standard of being "necessary" to safeguard the public safety;

(3) even if the Agreement were "necessary" under Section 253(b), the Commission must preempt it because it is not competitively neutral; and

(4) the Petition is defective on its face for failing to address whether the Agreement is consistent with Section 254.

Section 253(c) also does not save the Agreement because:

(1) the Agreement does not represent competitively neutral management of public rights-of-way; and

(2) Minnesota cannot delegate its right to receive compensation for use of rights-of-way to a private party.

The Commission has no option but to preempt the Agreement under Section 253.

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MFS Network Technologies, Inc. ("MFS"), through undersigned counsel and pursuant to the Commission's *Public Notice* (DA 98-32, rel. January 9, 1998), hereby submits its comments on the above-captioned Petition.

INTRODUCTION

Minnesota, through its Department of Transportation and Department of Administration (collectively "Minnesota"), has filed its Petition for a Declaratory Ruling ("Petition") to determine whether Section 253 of the Communications Act of 1934, as amended, ("Act")[1/] preempts the agreement that Minnesota executed with ICS/UCN LLC and Stone & Webster

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1/ References to provisions of the Act hereinafter will be in the form: "Section __."

Engineering Corporation (collectively "the Developer") on December 23, 1997.[2]

Minnesota's Petition requests that the Commission sanction (or at least decline to preempt) a scheme by which the state will trade exclusive access to public rights-of-way on interstate freeways for valuable telecommunications services and facilities. In exchange for the exclusive right to place telecommunications facilities and equipment longitudinally along freeway rights-of-way,[3] the Developer will build a 1,900 sheath mile fiber optic network in Minnesota (with 1,000 sheath miles traveling over freeways) and to give the state approximately 20% of the resulting lit fiber capacity and ten fiber strands on every dark fiber ring in the Developer's network. Petition, at 12; Agreement, § 3.3(a), (c). The Agreement has a duration of ten years, from completion of the Developer's network, and grants the Developer an "exclusive right of first negotiation" for an additional ten-year term. Agreement, § 11.1 (b), (e). Thus, for a period between ten and twenty years no other facilities-based carrier will be permitted to install its fiber optic facilities along the preferred routing enjoyed by the Developer.

MFS opposes the Agreement on the grounds that Minnesota has violated Section 253 by creating a barrier to entry that both prohibits and has the effect of prohibiting carriers from offering intrastate and interstate telecommunications services in the state. Moreover, neither Section 253(b) or (c) saves the Agreement from preemption. Specifically, Minnesota cannot rely on Section 253(b) because:

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[2] These comments will refer to this agreement as "the Agreement."

[3] The Agreement also gives the Developer a "right of negotiation" for access to freeway rights-of-way for placement of wireless telecommunications facilities. *See* Agreement, §§ 11.1(c)(iii), 11.7.

(1) permitting one party exclusive access to freeway rights-of-way longitudinally to the exclusion of all others, is not the least restrictive means of protecting public safety, but rather is the most restrictive means;

(2) the Agreement falls short of meeting the legal standard of being "necessary" to safeguard the public safety;

(3) even if the Agreement were "necessary" under Section 253(b), the Commission must preempt it because it is not competitively neutral; and

(4) the Petition is defective on its face for failing to address whether the Agreement is consistent with Section 254.

Minnesota also cannot rely on Section 253(c) to preserve the Agreement because it does not represent competitively neutral management of public rights-of-way and Minnesota cannot delegate its right to receive compensation for use of rights-of-way to a private party. In short, the Commission must preempt the Agreement under Section 253(d).

STANDARDS FOR PREEMPTION UNDER SECTION 253

Congress enacted Section 253 "to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition." *Public Utility Commission of Texas*, CCB Pol 96-13, et al., FCC 97-346, at ¶ 41 (rel. October 1, 1997) ("*Texas*"). Until passage of the Telecommunications Act of 1996, states could and did award monopoly status to certain firms to provide service in prescribed areas within the state. Pursuant to Section 253, such state actions are no longer permissible." *Id.*, ¶ 4. Thus, under the mandate of Section 253, the Commission is "obligated" to remove any state legal requirement that either (1) prohibits any firm from providing any intrastate or interstate telecommunications service or; (2) has the effect of prohibiting any firm

from providing any intrastate or interstate telecommunications service. *Id.*, ¶ 22. As Section 253(a) states:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The Commission has preempted both state and local legal requirements that constitute a *per se* prohibition, *see, e.g., Classic Telephone, Inc.*, CCBPol 96-10, FCC 96-397 (rel. October 1, 1996) ("*Classic Telephone*"), and those that have "the effect of prohibiting" the ability of an entity to provide a telecommunication service, *see, e.g., Texas*, ¶ 78.

The Commission must therefore preempt express restrictions on entry which prohibit a certain class of telecommunications providers from offering interstate or intrastate services or which, in the same vein, favor a particular provider to the exclusion of others. *See Classic Telephone*. Significantly, a direct restriction placed upon the "means or facilities" a new entrant may use to provide interstate or intrastate telecommunications constitutes precisely the type of express restriction prohibited by Section 253(a). *Texas*, ¶¶ 74-75 ("Section 253(a) bars State or local requirements that restrict the means or facilities through which a party is permitted to provide service."). Therefore, granting one telecommunications provider exclusive rights to one type of facilities, while conditioning the entry of other providers upon a requirement to use alternative facilities, substantially raises the costs and other burdens of offering telecommunications services" and violates Section 253 as an express restriction. *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCBPol 96-11, FCC 96-470, at ¶ 20 (rel. December 10, 1997) ("*New England*").

When a state or local legal requirement does not rise to the level of a direct restriction or

prohibition, it will nevertheless violate Section 253(a) if it "has the effect of prohibiting" the ability of an entity to provide a telecommunications service. Any legal restriction that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" has such a prohibited "effect." *California Payphone Association Petition for Preemption of Ordinance No. 576 of the City of Huntington Park, California Pursuant to § 253(d)*, CCB Pol 96-26, FCC 97-251, at ¶ 31 (rel. July 17, 1997). Thus, where a legal requirement on its face permits all competitors to enter a market, but places restrictions or limitations on some but not all competitors, the legal requirement will violate Section 253(a). *Id.*, ¶¶ 33-37.

Once it is determined that a state or legal requirement directly or indirectly restricts competition and therefore violates Section 253, the Commission then determines whether the otherwise prohibited restriction satisfies the requirements of Sections 253(b) or (c). Sections 253(b) and 253(c) are limited savings clauses. Both sections "carve out defined areas in which states may regulate or continue to regulate, subject to certain conditions." *Texas,* ¶ 44.

Section 253(b) permits states to impose requirements *necessary* to (a) "preserve and advance universal service," (b) "protect the public safety and welfare," (c) "ensure the continued quality of telecommunications services," and (d) "safeguard the rights of consumers," as long as such restrictions are "competitively neutral." 47 U.S.C. § 253(b) (1996). Thus, to pass Section 253(b) scrutiny, any restriction must be both *"necessary"* to achieve one of the enumerated public policy goals and "*competitively neutral.*" *Texas,* ¶¶ 82-83. If a restriction

fails *either* test, it cannot be "saved" by Section 253(b).[4/]

The Commission has defined the term "necessary" to mean something more than useful or reasonable, *see, e.g., Texas,* ¶¶ 84-87, and to involve a "detailed analysis of means and ends," *see, e.g., Silver Star,* ¶ 45. A "minimal link between the challenged legal requirement and the purported public interest objective" is insufficient. *Texas,* ¶ 87. Moreover, using the most restrictive means available will not satisfy the "necessary" test unless the state can affirmatively show that other less restrictive methods will not suffice. *New England,* ¶ 22; *Silver Star,* ¶ 42.

To survive preemption under Section 253(b), a restriction must also be "competitively neutral." A restriction that favors one competitor over another will inevitably violate this competitive neutrality requirement, as all similarly situated entities must be treated in the same manner. *Classic Telephone,* ¶ 37. As the Commission has explained, Congress envisioned that states "would enforce the public interest goals delineated in § 253(b) through means other than absolute prohibitions on entry." *Id.,* ¶ 38.

A second savings provision, Section 253(c), recognizes a state's authority to "manage the public rights-of-way and to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis." This provision respects those state requirements that manage the methods by which telecommunications providers may use public rights-of-ways. As the Commission has noted, the legislative history of Section 253(c) "sheds light on permissible

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[4/] A state's requirements must also be consistent with the Act's universal service requirements. *Silver Star Telephone Co. Inc.*, Petition for Preemption, CCBPol 97-1, FCC 97-336, at ¶ 40 (rel. September 24, 1997) ("*Silver Star*").

management functions." *Classic Telephone,* ¶ 39. Examples of the types of restrictions Congress intended to permit under Section 253(c) were detailed in the Senate floor debate, as follows:

> (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."

These types of rights-of-way management therefore will pass Section 253(c) scrutiny as long as they are applied to all telecommunications carriers seeking to use public rights-of-way on an equal basis.

The rights-of-way management provision, however, does not permit a state to use such management as a pretext to exclude certain competitors or to prefer a single competitor over others. Thus, any state regulation of rights-of-way access must be applied in a nondiscriminatory and equal manner. Moreover, management of public rights-of-way does not involve the evaluation of the subjective qualifications of particular competitors to provide service. *Payphone Order*, ¶ 12.[5/] Rather, the management of public rights-of-way under Section 253(d) is properly limited to developing the manner and methods of access that apply equally to all competitors. Section 253 does not condone creating a "third tier" of regulation of access to public rights-of-

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[5/] *Implementation of the Pay Telephone Reclassification and Compensation provision of the Telecommunications Act of 1996; Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation,* Order on Reconsideration, CC Docket Nos. 96-128 & 91-35, FCC 96-439 (rel. November 8, 1996) ("*Payphone Order*").

way "that extends far beyond the statutorily protected interests in managing the public rights-of-way." *TCI Cablevision of Oakland County, Inc.*, CSR-4790, FCC 97-331, at ¶¶ 102-103 (rel. September 19, 1997) ("*TCI*"). Here, Minnesota proposes to create a third tier of regulation under the Agreement, in addition to regulation of the Minnesota Public Utilities Commission and this Commission. Such "third tier" regulation that seeks "to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public" is not management of public rights-of-way. *Id.*, ¶¶ 104, 106.

ARGUMENT

I. THE MINNESOTA AGREEMENT VIOLATES THE PROSCRIPTIONS OF SECTION 253(a)

The challenged Agreement prohibits MFS and other interested parties from offering telecommunications services in violation of Section 253(a). As a threshold matter, Subsection A, below, establishes that Minnesota cannot exempt the Agreement from Section 253(a) by advancing arguments regarding the Act's definition of "telecommunications service." Subsection B discusses the manner in which the Agreement violates Section 253(a) — specifically, the Agreement both prohibits and has the effect of prohibiting entities from offering telecommunications services over facilities that they own, operate and maintain longitudinally along the freeway rights-of-way in Minnesota.

A. Minnesota Cannot Escape the Reach of Section 253(a) by Arguing That the Developer Is Not a Provider of "Telecommunications Services" and That the Agreement Concerns Only Placement of "Telecommunications Infrastructure"

Minnesota argues that Section 253(a) does not apply to the Developer or the Agreement

because:

(1) the Developer will be a wholesale provider of telecommunications capacity and not a provider of "telecommunications services" directly to the public; and

(2) the Agreement concerns the placement of "telecommunications infrastructure," not the provision of "telecommunications services."

Petition, at 13-17. Both arguments misconstrue the import of Section 253(a).

First, the fact that the Developer will use its exclusive access to 1,000 miles of freeway right-of-way to provide wholesale services is irrelevant. Not only will the Developer offer retail telecommunications to the public through its affiliates,[6] but more significantly, no other telecommunications provider will be able to provide either wholesale or retail interstate or intrastate services over its own fiber optic network using the 1,000 miles of freeway right-of-way that Minnesota has dedicated exclusively to one competitor's use. Thus, the type of service the Developer may offer, directly or indirectly, has no bearing upon whether Minnesota has violated Section 253(a). Rather, it is Minnesota's complete foreclosure of others from using the right-of-way to offer telecommunications services through their own facilities that is dispositive.

Moreover, the Act's definition of "telecommunications service" makes it clear that Section 253(a) does not differentiate between wholesale and retail services. Indeed, the definition of "telecommunications service" expressly includes both. Section 3(46) of the Act

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[6] *See, e.g.*, Petition, at 11 n. 11 ("Developer's affiliates may offer retail telecommunications services to the public and may utilize network transport capacity for this purpose."); Agreement, § 1.20 ("*the fiber optic network to be installed and operated [by the Developer] will increase the fiber optic network available to the general public* and increase competition within the State for the transport of information by means of fiber optic cable") (emphasis added).

defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public" (retail services) or "to such classes of users as to be effectively available directly to the public" (wholesale services). Agreement, § 3.1(b)(vii) (the Developer "shall have the right to use the Network only and solely for the purpose of providing to State and to telecommunications service providers, including Company Related Parties, *transport capacity, via lit or dark fibers and ancillary services for voice, video and data transport and transmission intrastate and interstate*") (emphasis added). Thus, there is no doubt that the Developer, pursuant to its Agreement with Minnesota, will offer "telecommunications services" within the meaning of the Act.

Minnesota's second argument — that the Agreement deals with telecommunications infrastructure, not telecommunications services — similarly fails. The Agreement, and its focus on the placement of telecommunications infrastructure on freeway rights-of-way, merely precedes the natural culmination of the Developer's business plan: the offering of wholesale and (through affiliates) retail telecommunications services. At no point in the past has the Commission distinguished between placing telecommunications infrastructure and the ensuing step of offering telecommunications services. To the contrary, the Commission has ruled that "section 253(a) bars state or local requirements that restrict the means *or facilities* through which a party is permitted to provide service." *Texas*, ¶ 74 (emphasis added).

In short, Minnesota's prodigious efforts to exempt the Agreement from Section 253(a) do not diminish the Commission's obligation to preempt exclusivity provisions of the Agreement.

B. Minnesota Has Violated Section 253(a)

1. The Agreement Represent a *Per Se* Prohibition on the Ability of All Entities, Except the Developer, to Offer Telecommunications Services

The Agreement represents a *per se* prohibition on the ability of telecommunications providers, other than the Developer, to offer telecommunications services over facilities that they own, operate and maintain longitudinally along Minnesota's freeway rights-of-way. Under the Agreement, Minnesota has bound itself "not [to] grant a license, permit or other right to any party to construct, install and operate a fiber optic communications system longitudinally within the Freeway Right of Way locations" reserved for the Developer.[7] Agreement, § 11.1(a).

Through this exclusivity provision, Minnesota has foreclosed competitive installation of fiber facilities. If a competitor desires its own fiber facilities, the Agreement provides that it must contract with the Developer for the installation of facilities and only the Developer is authorized to operate and maintain those facilities. Agreement, § 7.4. Moreover, the Developer will only construct such facilities if the construction is done at the same time the Developer constructs its own facilities. Even this theoretical and impractical scenario does not permit competitive access to freeway rights-of-way because the Developer controls the cost and quality of construction, the timing of construction, and the maintenance and operation of all facilities. This absolute control by the Developer assures that there can be no effective competition between the Developer and other facilities based carriers over the 1,000 miles of right-of-way to which the Developer has, and maintains exclusive access. Significantly, even if a competitor did

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[7] These reserved locations include approximately 1,000 miles of freeways in Minnesota. Petition, at 12.

contract with the Developer for construction and operation of facilities, the competitor would not have its own permit to occupy freeway right-of-way, but would be completely dependent upon the Developer. If the Developer breached the Agreement, or if the Agreement terminated, Minnesota could require the competitor to remove its facilities from the right-of-way, and title to the competitor's facilities would vest in the state. Agreement, § 15.4(e); § 15.5(b), (c). Minnesota's prohibition is therefore a *per se* "legal requirement" that prohibits "the ability of any entity to provide any interstate or intrastate telecommunications service" and, on its face, is subject to preemption under Section 253(d).[8/]

The instant case is closely analogous to *Silver Star*, in which the Commission preempted a Wyoming statute that conferred on rural incumbent local exchange carriers ("LECs") the right to veto the certification applications of competitors. There, the Commission properly exercised its power under Section 253 to preempt a *per se* legal preference for one set of carriers over another: "[t]his State statutory provision favors certain incumbent LECs over all potential new entrants." *Silver Star*, ¶ 42. In this case, the Developer has negotiated with Minnesota to veto *in advance* all applications of potential new entrants seeking to access freeway rights-of-way longitudinally. As with Wyoming's treatment of rural incumbent LECs, Minnesota has

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[8/] Although telecommunications services offered over facilities that travel longitudinally along freeway rights-of-way may be a small subset of the universe of telecommunications services offered in Minnesota, they are nonetheless an identifiable and extremely valuable subset, which enjoys a distinct cost advantage over other types of services. *See* Exhibit A, Eide Declaration, ¶¶ 10-20 (concluding that telecommunications services offered over freeway rights-of-way have a cost advantage vis-a-vis services offered over other rights-of-way). Section 253(a) easily reaches this subset, for Congress broadly extended it to "*any* interstate or intrastate telecommunications service." (Emphasis added). Further, the Commission has ruled that Congress amended the Act, by Section 253 among others, to facilitate entry of competitors into "all" telecommunications markets. *Classic Telephone*, ¶ 25.

unlawfully preferred the Developer over all other entities in the state.[9] The Commission must act to preempt Minnesota's *per se* legal preference for the Developer. *See id.*, ¶ 42 ("the rural incumbent protection provision awards those incumbent LECs the ultimate competitive advantage – preservation of monopoly status – and saddled potential new entrants with the ultimate competitive disadvantage – an insurmountable barrier to entry."); *see also Classic Telephone*, ¶ 37 ("mandate of competitive neutrality requires [local governments] to treat similarly situated entities in the same manner," rather than preferring one entity over another).

2. Minnesota's Decision to Enter the Agreement Has the Effect of Prohibiting All Entities, Except the Developer, From Offering Telecommunications Services

Minnesota argues that sufficient alternative rights-of-way and telecommunications capacity exist in the state, such that its decision to enter the Agreement does not actually prohibit any entity from offering telecommunications services. Petition, at 21-25. Even if this argument survived the first prong of Section 253, it crumbles under the weight of the second prong. As an "independent basis" for preemption,[10] the Commission should find that Minnesota's decision to enter the Agreement has "the effect of prohibiting the ability" of entities in Minnesota, besides the Developer, from offering telecommunications services over facilities that they own, operate and maintain longitudinally along the state's freeway rights-of-way. 47 U.S.C. § 253(a) (1996).

Contrary to Minnesota's assertions, it is not significant that parties may offer

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[9] Minnesota claims that "No new restrictions are being imposed on this already competitive market that did not exist prior to the evolution of robust competition for fiber transport capacity." Petition, at 4. However, preferences favoring a single entity, such as those in the Agreement, need not take the form of a new restriction.

[10] *Texas*, ¶ 78.

telecommunications services over other facilities that are superficially similar to the Developer's services because Minnesota has denied them the cost advantages of offering services over facilities on freeway rights-of-way. The attached declaration of Robert Eide (at Exhibit A) attests to the cost advantages of placing facilities over freeway rights-of-way and explains that other rights-of-way are not equivalent. Eide Declaration, ¶¶ 10-20. Moreover, the cost and other advantages of exclusive access rights to freeway rights-of-way are decisively evidenced by the Developer's agreement to trade more than 20% of its overall network capacity for exclusive use of Minnesota's freeways.[11/] *See* Agreement, § 3.3(a), (c). The Developer hardly would have signed such an agreement, if other rights-of-way truly were equivalent in terms of cost (not to mention availability and coverage of the state).

By forcing the Developer's competitors to route facilities around, rather than over, freeway rights-of-way, the Agreement increases their costs of offering telecommunications services. The Commission has ruled that increasing some competitors' costs to offer service undermines the "fair and balanced environment" that it requires under the second prong of Section 253(a).[12/] *Texas*, ¶ 81. In *Texas*, the Commission preempted a statutory "build-out requirement" that would have required AT&T, MCI and Sprint to make investments in local

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[11/] It goes without saying that, contrary to the second part of Minnesota's argument. there would be inherent cost disadvantages of attempting to route services over existing telecommunications facilities owned by other parties. The costs of providing service over leased telecommunications capacity will always exceed the costs of providing service over one's own capacity.

[12/] To be more precise, the Commission has stated that the standard for determining when a legal requirement has the "effect of prohibiting" entities from offering telecommunications services under Section 253(a) is whether or not it leads to a "fair and balanced legal and regulatory environment." *Huntington Park*, ¶ 31.

telecommunications facilities in order to be authorized to compete in the state's local exchange markets. *Texas*, ¶ 78. The Commission specifically found that these interexchange carriers would not be competitive vis-a-vis incumbent local exchange carriers if the build-out requirements remained in effect: "We also conclude that the economic impact of the build-out requirements are great enough to have the effect of prohibiting entities subject to these requirements from providing competitive local exchange service in Texas." *Id.*, ¶ 81; *see id.*, ¶ 79-80 (comparing the anticipated loop costs of AT&T to those of Southwestern Bell-Texas).

Like the state's action in *Texas*, Minnesota's decision to enter into the exclusive Agreement has the effect of restricting the facilities that competitors may use to enter the market (*i.e.*, it denies competitors the right to employ an entry strategy involving longitudinal placement of facilities over freeway rights-of-way). *Id.*, ¶ 74. As the Commission has ruled: "section 253(a) bars state or local requirements that restrict the means *or facilities* through which a party is permitted to provide service." *Id.* (emphasis added). Minnesota is unlawfully attempting to influence the entry strategy of competitors in the state's local exchange markets. *See id.*, ¶ 75 (discussing Congress's intention not to favor one entry strategy over another).

Minnesota's decision to advantage the Developer, and to disadvantage its competitors, by making freeway rights-of-way selectively accessible is no less harmful to competition than the build-out requirements preempted in *Texas*. The Commission should therefore preempt the exclusivity provisions of the Agreement.

II. THE AGREEMENT DOES NOT QUALIFY FOR THE EXCEPTION TO PREEMPTION IN SECTION 253(b)

In an effort to shield the Agreement from preemption, Minnesota attempts to show that it has met the requirements of Section 253(b). Minnesota argues that public safety considerations demand granting exclusive longitudinal access to freeway rights-of-way to a single party and that it has done so in a competitively neutral manner. Petition, at 26-28. The subsections below demonstrate that:

(1) public safety is achieved by regulating the methods used to construct and maintain facilities, not by granting exclusive access to rights-of -way;

(2) the Agreement does not meet the legal standard of being "necessary" to protect the public safety;

(3) even if the Agreement were "necessary" under Section 253(b), the Commission must preempt it because it is not competitively neutral; and

(4) Minnesota's Petition is facially defective for failing to address whether the Agreement is consistent with Section 254.

Any one of the foregoing showings is alone dispositive. Taken together, they entirely eliminate the possibility that Minnesota could demonstrate that Section 253(b) saves the Agreement from preemption.

A. Public Safety Is Achieved By Regulating the Methods Used to Construct and Maintain Facilities, Not by Granting Exclusive Access

Until 1989, the Federal Highway Administration of the United States Department of Transportation ("FHWA") prohibited the installation of fiber optic facilities longitudinally in the rights-of-way of federally funded controlled access highways ("freeways") such as the 1,000

miles of freeway at issue here, except in very limited circumstances. Agreement, § 1.4. In 1988, the FHWA revised its policy to permit states, under FHWA-approved state plans, to allow such utility accommodation, finding that:

> it is in the public interest for utility facilities to be accommodated on the rights-of-way of a Federal aid or direct Federal highway project when such use and occupancy of the highway rights-of-way do not adversely affect highway or traffic safety, or otherwise impair the highway or its aesthetic quality, and do not conflict with the provisions of Federal, State, or local laws or regulations.

23 C.F.R. § 645.205(a) (*Policy*). The FHWA recognized that the "manner" in which utilities occupy rights-of-way must preserve "the operational safety and the function and aesthetic quality of the highway facilities." *Id.* at § 645.205(c). Accordingly, the FHWA provided that "the design, location, and the manner in which utilities use and occupy the right-of way . . . must provide for a safe traveling environment." *Id.* at § 645.209(a) (*General Requirements, Safety*). The FHWA, therefore, required States to adopt "reasonably uniform policies and procedures for utility accommodation." *Id.* at § 645.209(d).

The FHWA adopted the American Association of State Highway and Transportation Officials' ("AASHTO") *Roadside Design Guide* and the *AASHTO Policy on Geometric Design of Highways and Streets* (1990) for guidance on safety and other associated issues, and issued its own *Program Guide, Utility Adjustments and Accommodation on Federal-Aid Highway Projects* (Pub. No. FHWA-PD-95-029) (the "FHWA Guide."). In 1989, AASHTO also issued further guidance on the safe accommodation of utilities within freeway rights-of-way. *A Policy on the Accommodation of Utilities Within Freeway Rights-of-Way* (1998, AASHTO).

Minnesota adopted its own utility accommodation policy in 1990, *Procedures for*

Accommodation of Utilities on Highway Right of Way (Highway No. 90-1-P1) ("Minnesota Utility Accommodation Policy").

Significantly, the Minnesota Utility Accommodation Policy does not limit the number of telecommunications providers that may obtain permits to install fiber optic facilities longitudinally within Minnesota freeway rights-of-way. Moreover, even the Agreement challenged here recognizes that "access permits for a single or *very limited number of installations* of fiber optic cable and related facilities within the control of access lanes of freeways throughout the State can be accomplished consistent with public health, safety and welfare. . . ." Agreement, § 1.9. (emphasis supplied). Without citing any supporting evidence, however, in either its Agreement or its submissions to the Commission, Minnesota concludes that only one party should be granted the exclusive right to accommodation on its freeway right-of-way longitudinally.

This *de facto* one-provider rule, not formally adopted by any Minnesota statute or regulation, is not supported by any of the policies adopted by the FHWA or the official standard setting body, AASHTO, nor Minnesota's own Utility Accommodation Policy or rules, *e.g.*, Minn. Rules, Part 8810, *et seq.*

To the contrary, all Minnesota, FHWA and AASHTO policies – until Minnesota entered into the exclusive Agreement – were directed towards assuring that when fiber facilities are placed longitudinally in freeway rights-of-way, safety issues are fully addressed, and the methods of fiber placement and maintenance are designed to assure safety. For example, the Minnesota Utility Accommodation Policy states:

The placement of underground utilities may be permitted

> longitudinally within freeway right-of-way, provided the utility is placed in accordance with these procedures [as stated in this policy], and the utility owner has received an approved permit and/or written agreement from the department. Above ground appurtenances shall not be allowed within freeway right-of-way except as stated in these procedures.

Minnesota Utility Accommodation Policy at § VI. The Minnesota Utility Accommodation Policy also states that the proposed longitudinal occupancy must "conform to AASHTO policy, A Policy on the Accommodation of Utilities Within Freeway Rights-of-Way and U.S. Code, Title 23, Part 645.209(c)." *Id.* at D.[13/]

Although the referenced AASHTO policy does not generally recommend longitudinal placement of even underground utilities in freeway rights-of-way, AASHTO recognized in 1995 that buried fiber optic cable is unique because it can occupy freeway rights-of-way safely. AASHTO recognized that:

> WHEREAS, buried fiber optic cable can be installed with minimal disturbance of existing traffic, require infrequent access for maintenance purpose, can usually be sited to even further minimize disruption or hazard to vehicular freeway users, and in other ways can be distinguished from other types of utilities such as pipelines and electrical transmission facilities;

AASHTO policy adopted on October 10, 1995 (Exhibit B hereto).

Minnesota's Utility Accommodation Policy is consistent with this AASHTO finding, and, as noted, Minnesota has adopted AASHTO policy. Thus, until Minnesota entered into the exclusive Agreement, it focused on assuring that utility placement was accomplished in a safe

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[13/] Likewise, Minnesota adopted other AASHTO policies which detail how utilities may be accommodated safely. *E.g.*, Minnesota Utility Accommodation Policy at Sections V and VI.

manner. Minnesota required all applicants for permits to construct facilities in hihway right-of-way to agree to abide by safety requirements, as a condition of the permit:

> *B. The applicant shall also agree to comply with relevant regulations of all other governmental agencies required for the protection of the public.*
>
> *C. The applicant shall agree that all work will be accomplished in a manner that will not be detrimental to the highway and that will safeguard the public.*

Minnesota Utility Accommodation Policy at Section III, p. 6.

Finally, the Minnesota Utility Accommodation Policy never contemplated exclusive access in freeway right-of-way by one telecommunications company. Rather, its policy provides for review on a permit request basis and expressly reserves the right to require a permitted telecommunications company to install multiple interduct so that other companies may purchase the interduct and install, manage and operate their own fiber facilities. This approach would not only minimize construction activities but would assure that competitors could install, own and operate their own fiber facilities in freeway right-of-way. Thus, the challenged Agreement conflicts with Minnesota's own historical policies.

In summary, no safety policy governing freeway rights-of-way supports Minnesota's bald assertion that exclusive access by one company is required to protect public safety. Rather, these policies are all designed to assure that *all* companies occupying freeway rights-of-way do so in a manner that protects public safety.

B. The Agreement Is Not "Necessary," Under Section 253(b), to Protect the Public Safety

It is insufficient for Minnesota merely to show that its motivation for entering the